Chapter Five:
Nonpoint Source Water Pollution, CWA § 319, and Best Management Practices

I. Introduction

Improvements to the nation's waters over the past three decades are largely due to the control of traditional point sources of water pollution. However, a large number of waterbodies remain impaired and the goal of eliminating pollutant discharge and attaining fishable and swimmable waters is still unrealized.[1] Nonpoint sources of pollution such as agriculture, construction, forestry, and mining are responsible for much of the nation's remaining water quality impairment. On Federal land, the most important nonpoint sources of pollution are timber harvesting, livestock grazing, roadbuilding, and mining.[2]

In contrast to the point source discharge permit program, the approach to controlling nonpoint sources of water pollution has not been regulatory. Because Congress has regarded Federal regulation of nonpoint sources as an undue infringement upon traditional state and local prerogatives to control land use, it has approached the control of nonpoint sources far more gingerly than that of point sources of pollution. The CWA originally envisioned that nonpoint sources of pollution would be dealt with at the state and local level through area waste management plans mandated by CWA § 208. This section required states to engage in a planning process that, among other things, identified and controlled nonpoint sources of pollution. This planning process was not sufficient to address nonpoint source pollution, and the 1987 amendment to the CWA included § 319.

---

[1] According to the EPA, in 2000, 40% of the rivers and streams, 45% of the lakes, and 50% of the estuaries were impaired. See National Water Quality Inventory Report to Congress (305(b) report), 2000. Available at: http://www.epa.gov/305b/2000report/.

[2] Glicksman, Robert. Pollution on the Federal Lands II: Water Pollution Law. 12 UCLA J. Envtl. L. and Pol'y 61. 1993.

Section 319 retained significant planning components, but added a grants program to entice states to control nonpoint source pollution. States are to identify waters not attaining water quality standards (WQS) without additional nonpoint source controls, identify best management practices (BMPs) for categories of nonpoint source problems, and develop programs to implement the BMPs. Federal grants are available to develop and implement these measures. This nonpoint source management program is intended to operate voluntarily through financial incentives from the federal government. The voluntary approach to nonpoint source water pollution reflects Congress's reluctance to encroach upon traditional state and local prerogatives to control land use decisions.

II. Definition of Nonpoint Source Pollution

Nonpoint source pollution is not specifically defined in the CWA. As mentioned in Chapter One, the CWA defines a point source as "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged."[3] It follows that any source that is not a point source is a nonpoint source. This lack of definition has resulted in some confusion. For example, storm water runoff from construction sites, industrial facilities, certain municipal areas, and concentrated animal feeding operations are point sources. However, similar diffuse sources such as agricultural storm water runoff and irrigated agriculture return flows are specifically excluded from the definition of point source.[4]

[3] 33 U.S.C. sec 1362(14).
[4] *Id*.

The general rule is a nonpoint source is diffuse runoff caused by rainfall or snowmelt moving over the ground carrying pollutants into waterbodies.[5] Atmospheric deposition and hydrologic modification are also generally considered nonpoint sources of pollution.[6]

As mentioned above, the BLM is most concerned with nonpoint source pollution from timber harvesting, livestock grazing, roadbuilding, and mining. Logging, reforestation, and road construction disturbs soil and facilitates erosion. Soil movement into water bodies may increase water temperature, turbidity, and sedimentation, as well as reduce light penetration. Forest treatments can also generate nonpoint source pollution through the addition of fertilizers, herbicides, fire retardants, etc. Livestock grazing generates additional soil erosion. Cattle destroy riparian vegetation and trample soil, thus increasing runoff. Cattle also discharge chemical and biological pollutants into waterbodies through urine and manure. Mining activities generate soil erosion and sedimentation, and can result in acid drainage.

III. Evolution of Nonpoint Source Pollution Control

A. 1972 Planning Provisions: CWA § 208

Congress addressed the problem of nonpoint source water pollution in the 1972 amendments to the CWA through a planning process under §§ 208 and 303(e). Section 208 of the CWA required each state to identify the boundaries of each area in the state with water quality problems. A planning agency was then given the responsibility to develop an "area-wide waste management plan" for each area.[7] Once the plan was established, the state agency was

[5] U.S. Environmental Protection Agency, Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years, at http://www.epa.gov/owow/nps/guide.html.
[6] *Id*.
[7] 33 U.S.C. sec 1288(a).

responsible for implementing a continuous planning process that identified sources of pollution from agriculture, silviculture, mining, and construction.[8] Federal grants were available to states to assist with this planning process.[9]

In addition to area wide waste management plans under § 208, each state was required to implement a continuous planning process for each navigable water within the state. Section 303(e) required the state to incorporate the area wide waste management plans into this overall planning process. Thus, states were required to conduct area plans under § 208 and incorporate those local plans into an overall statewide planning process culminating in a Water Quality Management Plan (WQMP). The WQMP was to include best management practices for controlling the sources of nonpoint pollution identified under the § 208 plan as significant sources of concern.[10]

These planning requirements did not involve any direct Federal regulation and there was little penalty for not engaging in the planning process. Also, there was no Federal funding available for implementation of the plan. If states choose not to develop a plan, then they simply did not receive the grant money available for plan development.

B. The Water Quality Act of 1987: CWA § 319

Recognizing the continuing problem of nonpoint source pollution, Congress added § 319 to the CWA through the 1987 amendments. This section specifically addresses the creation of nonpoint source management programs through a three-stage process: 1) states develop nonpoint source assessment reports; 2) states adopt nonpoint source management programs; and 3) states phase in the programs with the assistance of Federal funds. Despite the changes brought about

[8] 33 U.S.C. sec 1288(b).
[9] 33 U.S.C. sec 12888(f).
[10] 40 C.F.R. sec 130.6(c)(4).

by § 319, Congress's reluctance to infringe upon local land use control essentially created another planning provision, but this time with a "carrot" to encourage implementation. The CWA authorized up to $400 million over four years to fund the state management programs.[11] However, Congress has often failed to appropriate the money. Additionally, the statute provides no sanction against states for failing to submit an adequate plan. With an under-funded "carrot" and a nonexistent "stick" the implementation of § 319 has been frustrated.

There is general consensus that § 319 has brought about some positive steps, but it has not comprehensively addressed nonpoint source pollution problems. Environmental groups criticize the EPA for providing inadequate guidance on methods or management practices [12] and fault the EPA for not advancing controls beyond known problems and existing implementation steps, such as voluntary compliance and public education.[13] The EPA acknowledges that the quality of assessment reports and management plans are quite variable. Reasons they cite include staff limitations, lack of funding, limited Federal clout in an essentially voluntary program, and variations in the way regions administer the program. There is a fear that § 319 will suffer the same fate as § 208, but there is little consensus on alternative methods for addressing nonpoint source pollution.

[11] 33 U.S.C. § 1329(j), CWA § 319(j).
[12] In May 1996, the EPA and the states issued an agreement titled "Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years." This agreement, criticized by many environmental groups, gives states more flexibility in administering their nonpoint source control programs and streamlines the grants program.
[13] Copeland, Claudia. Clean Water Quality: Implementing the Clean Water Act. Congressional Research Services. Aug. 27, 2003.

IV. Stages of the Section 319 Program

A. State Assessment Reports

Section 319(a) requires each state to submit to the EPA an assessment report that identifies the navigable waters within the state that will not meet state water quality standards without additional controls for nonpoint sources of pollution. The state must identify the categories, subcategories, and individual nonpoint sources that contribute to water quality impairment.[14] The state must then describe a program for the development of BMPs to control the identified nonpoint sources of pollution.[15] If a state fails to submit the report to the EPA by applicable deadlines, the EPA is to prepare the assessment report for that state.[16]

B. State Management Programs

Under § 319(b), states are to develop state management programs and submit them to the EPA for review and approval.[17] The management program must identify the BMPs and measures that the state will use to reduce pollutant loading from nonpoint sources identified in the assessment reports. The program must not only identify the BMPs to be used, but it must outline the regulatory and nonregulatory provisions for the implementation of the BMPs. Finally, the state management program must include a schedule that outlines identifiable and measurable milestones for BMP implementation. In order for the state to receive Federal funding under § 319(h), the EPA must approve the state's management program.

[14] 33 U.S.C. sec 1329(a).
[15] *Id*.
[16] 33 U.S.C. sec 1329(c)(2).
[17] 33 U.S.C. sec 1329(b).

C. Federal Grants

Section 319(h) authorizes the EPA to issue grants to states and tribes for the implementation of nonpoint source pollution control. The Federal share for financing a management program cannot exceed 60 percent, and a state must have made satisfactory progress towards implementation of the management program in the prior fiscal year. Congress authorized up to $400 million over four years to fund state management programs,[18] but has often failed to appropriate funds. The EPA is also authorized to prioritize funding for projects that address difficult nonpoint source pollution problems.[19]

V. Implementation of CWA § 319

A. Best Management Practices (BMPs)

States have primarily implemented their nonpoint source management plans through BMPs. BMPs are methods, measures, or practices to prevent or reduce water pollution, including, but not limited to, structural and nonstructural controls and operation and maintenance procedures.[20] These practices are usually applied as a system of practices rather than a single practice and are selected on the basis of site-specific conditions that reflect natural background conditions and political, social, economic, and technical feasibility.[21] BMPs can be applied before, during, and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.[22]

---

[18] 33 U.S.C. sec 1329(j).
[19] CWA § 319(h)(5).
[20] 40 C.F.R. 130.2(m).
[21] U.S. Environmental Protection Agency, Office of Water, 1985, Final Report on the Federal/State/Local Nonpoint Source Task Force and Recommended National Nonpoint Source Policy, January 1985.
[22] 40 CFR 130.

As mentioned above, the CWA requires states to develop BMPs to control nonpoint sources of pollution and develop BMP implementation plans with deadlines. However, apart from developing a plan, there are few substantive requirements in § 319. States can implement their § 319 plans through state regulations. Even though EPA can use federal grants to encourage implementation of BMPs, they cannot force states to do it.

B. Water Quality Standards and Nonpoint Source Control

Although WQSs can be used to restrict effluent limitations on point sources, private landowners are generally not subject to sanctions under the CWA for violating the WQSs because of nonpoint sources. For nonpoint sources, states often require the use of BMPs. If BMPs are not used, landowners could face penalties for violating WQSs. However, if the landowner implements BMPs and WQSs are still not met, the landowner rarely faces sanctions. When WQSs are not met because of nonpoint sources, states often do not use direct regulatory means, but adopt the more indirect approach of tightening the BMPs.

For Federal land management agencies, however, adherence to BMPs does not automatically exempt them from meeting state WQS. In a 1985 Ninth Circuit decision, the court held that the CWA requires Federal agencies to comply with state WQSs and those agencies are not exempt from regulation simply because they comply with applicable BMPs.[23] The Forest Service had proposed road construction in a national forest which its environmental impact statement (EIS) found would violate state WQS despite the application of state-accepted BMPs. The court found that BMPs are merely a means to achieve the state WQS, and are not themselves

[23] *Northwest Indian Cemetery Protective Ass'n v. R. Peterson*, 764 F.2d 581 (9th Cir. 1985) (draft EIS proposed alternate routes to complete construction of a section of a paved road from Gasquet, CA, to Orleans, CA, known as the G-O Road). This decision was withdrawn by the Ninth Circuit, but it reached the same conclusion on this issue on rehearing. 795 F.2d 688, 697 (1986), rev'd on other grounds sub nom. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

the standards. The Ninth Circuit held that, because the Forest Service projects would have violated the state standards, the agency was in violation of the CWA despite its use of BMPs.

C. TMDLs and Nonpoint Source Control

Even though § 319 does not provide Federal regulatory mechanisms for the control of nonpoint source pollution, § 319 in conjunction with § 303(d) provides a measure of Federal enforceability. In theory, sections 303(d) and 319's approaches to nonpoint source pollution are compatible. Section 319 is the carrot, funding state programs for nonpoint source pollution abatement statewide for all waters whether they are currently above standard or below. Section 319's provisions are voluntary, allowing states to choose or decline participation, and allowing participating states to choose a regulatory approach to implementation or not. Section 303(d), on the other hand, is intended for chronically polluted waters and is a stick. The stick is requiring quantified pollution load allocations (LAs) under the TMDL program. The nature of the allocations and of the implementing controls remains up to the states, but states are required by Federal law to come up with load allocations for nonpoint sources.

The EPA has recently begun to explicitly link implementation of § 319 with TMDL activities.[24] For example, in September 2001, the EPA published guidance saying that grants awarded under § 319 should have a concentrated focus on the development and implementation of TMDLs for nonpoint sources of pollution, although funds will still be awarded to activities other than TMDLs.[25] However, states and agricultural interests criticized the guidance as being too restrictive. In August 2002, the EPA modified the guidance, which continues to encourage

[24] Ryan, Mark, editor. The Clean Water Act handbook. Chicago : Section of Environment, Energy, and Resources, American Bar Association, c2003. p. 200.
[25] Supplement Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2002 and Subsequent Years, 66 Fed. Reg. 47,653 (2001). Available at: http://www.epa.gov/owow/nps/Section319/fy2002.html.

development of nonpoint source TMDLs, but gives states more flexibility to do so, especially in areas that lack formally-established TMDLs. States may use up to 20% of the § 319 base grant funding for development of TMDLs and related activities and may use up to 20% of the incremental funding for similar purposes.[26]

VI. Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution

The lack of a Federal regulatory framework for nonpoint sources of water pollution does not mean a complete absence of regulatory laws. In the absence of any Federal legislative or regulatory norm, the states have exhibited great diversity in their nonpoint source legislation (see individual state summaries for how western states have controlled nonpoint source pollution with enforceable provisions). Most states have some general statutory authority to deal with nonpoint source discharges. These provisions often resemble the CWA's prohibition of the discharge of a pollutant without a permit, but unlike the Federal act, these state statutes can be applied to nonpoint source pollution because they lack the Federal limitation which defines "discharge of a pollutant" as "from any point source."[27]

States' general discharge prohibition authorities are usually one of two types.[28] One type prohibits the discharge of any substance (or pollutant, or waste) without a permit. This broad authority can serve as either the basis for adopting a permitting program or for enforcement against discharges on a case-by-case basis. Some states with this type of authority have adopted explicit statutory or regulatory exemptions for certain activities (usually agriculture, forestry, or grazing). Under the second type of general discharge prohibition, states have provisions that

[26] Ryan, *supra* note 24 at p. 200.
[27] 33 U.S.C. §1362(12).
[28] Environmental Law Institute. Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution. 1997.

simply prohibit the causing of "pollution," or causing or contributing to the exceedance of water quality standards. These prohibitions, however, face the difficulty of proving a direct link between a particular discharge and the degradation of water quality. This proof can be difficult, but it nevertheless allows states to impose regulatory control in relatively clear-cut cases.

Some states' discharge prohibitions serve as the basis for the imposition of direct regulatory requirements on nonpoint source discharges, but generally they operate as back-up enforcement and are only used when voluntary and/or incentive measures fail.[29] Voluntary or incentive measures at the state level include watershed and land use planning, development of voluntary best management practices, technical assistance programs, and cost-sharing for implementation of prevention and control measures.

States also apply a regulatory framework to operating standards and practices through targeted laws. These can include erosion control laws, forest practice laws, and agricultural conservation laws.

A. Erosion and Sediment Control

Enforceable erosion and sediment control laws provide significant nonpoint source water pollution control. Many of these laws apply statewide, and some are delegable to local governments or soil conservation districts. However, most of these programs exempt normal agricultural activities and/or forestry. Thus, where these laws exist and where they have coverage beyond simple NPDES storm water permitting, they are usually directed at construction activities.

[29] *Id*.

B. Forestry Control

Forestry laws primarily play a role in nonpoint source pollution control on the west coast. These states generally require the preparation and approval of harvest plans incorporating state standards or prescribed BMPs. States also may regulate forest practices through erosion and sediment control laws, or through requirements establishing riparian buffer zones limiting vegetation removal near waterways, wetlands, or other areas. Another approach has been to require licensing for loggers and/or professional foresters. While licensing does not limit nonpoint source pollution, it can serve as a means of supervising forest activities.

C. Agriculture and Grazing Control

States have generally controlled agriculture and grazing through mechanisms to make BMPs enforceable. The Environmental Law Institute identified five ways in which states have approached this.[30] First, some laws make BMPs directly enforceable in connection with required plans and permits. A second approach makes BMPs enforceable, but only after the fact when a "bad actor" is causing pollution. A third approach makes BMPs the basis for an exemption from a regulatory program. Fourth, compliance with BMPs may be an allowable defense to a regulatory violation (for example, a state could be prohibited from taking action under a water pollution control statute against a farm that is implementing BMPs, whether or not the operation is causing pollution). Finally, many states make compliance with BMPs a defense to nuisance actions (for example, a neighboring landowner could not sue under state nuisance laws if BMPs are implemented).

[30] *Id*.

VII. Nonpoint Source Control on the Coast: The Coastal Zone Management Act and the National Estuary Program

A. Coastal Zone Management Program

The Coastal Zone Management (CZM) Act provides for the protection of coastal areas from nonpoint sources of pollution.[31] The CZM program is a voluntary partnership between the Federal government and the 28 coastal states. Like § 319 of the CWA, the CZM Act establishes incentive-based planning programs aimed at regulating land uses and coastal developments that impede the attainment of established water quality standards.[32] Under the CZM program, which is jointly administered by the EPA and the National Oceanic and Atmospheric Administration (NOAA), the participating states must develop Coastal Nonpoint Pollution Control (CNPC) programs.

The CNPC programs describe how the state will implement nonpoint source pollution controls in accordance with technical guidance issued by the EPA.[33] These CNPC programs are to augment the § 319 CWA programs. Specifically, coastal states are required to develop programs, including enforceable management measures, that would attain water quality standards.[34] The EPA has published technical guidance on management measures,[35] and those applicable to the BLM include guidance for forestry, hydromodification (channel modification, dams, and streambank erosion), and wetland, riparian area, and vegetated treatment systems.

---

[31] Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, as amended by the Coastal Zone Act Reauthorization Amendments of 1990 (Pub. L. 101-508).
[32] Ryan, *supra* note 24 at p. 200.
[33] U.S. Environmental Protection Agency, Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters (Jan. 1993).
[34] U.S. EPA, Protecting Coastal Waters from Nonpoint Source Pollution, Pointer No. 5 (EPA841-F-96-004E).
[35] U.S. EPA, Office of Wetlands, Oceans, and Watersheds, Coastal Zone Website at http://www.epa.gov/owow/nps/MMGI/.

B. National Estuary Program

The 1987 amendments to the CWA created the National Estuary Program (NEP) to promote long-term planning and management for nationally significant estuaries threatened by pollution, development, or overuse.[36] The NEP requires the preparation of Comprehensive Conservation and Management Plans (CCMP) which recommend approaches for correcting and preventing problems for estuaries nominated by state Governors or the EPA. A CCMP is prepared through a management conference, to which Federal, state, and local governments, representatives of industry, and the general public may be invited. There are currently 28 estuaries included in the NEP, of which six are on the west coast (see Figure One).

Figure One: National Estuaries on the West Coast
Puget Sound, WA Santa Monica Bay, CA San Francisco Estuary, CA Tillamook Bay, OR Morro Bay, CA Lower Columbia River Estuary, OR/WA

Areas covered by the program are eligible for $300,000-$500,000 in Federal grants annually for three years. Up to 75 percent of the cost of the state estuary management programs may be paid for with Federal grants, and not more than 10 percent of the money may be used for administrative costs. The remainder is to be used for research, surveys, modeling, and studies necessary to develop the CCMP.

[36] 33 U.S.C. § 1330; CWA § 320.

VIII. Federal Land Management and Nonpoint Source Control

A. Federal Consistency

Although § 319 is generally considered non-regulatory, it does provide some enforceable provisions on Federal public lands. States are required to determine whether Federal financial assistance and development projects are consistent with their § 319 programs. The Federal consistency provisions in CWA § 319(b)(2)(F) and (k) authorize each state to review Federal activities for consistency with the state nonpoint source management program. If the state determines than an application or project is not consistent with the goals and objectives of its programs, the Federal agency must make efforts to accommodate the state's concerns.[37] The EPA has indicated that this obligation encompasses reviewing forest plans, resource area analyses, integrated resource management plans, timber sales, and watershed management plans.[38]

The EPA has issued guidance on the Federal consistency components of the CWA.[39] It encourages Federal agencies to work closely with states to draft memoranda of understanding (MOUs) that accurately reflect the goals and objectives of the state's nonpoint source management program. In some cases, the BLM has agreed to implement BMPs which meet or exceed those listed by the states.[40]

---

[37] Executive Order (EO) 12372.
[38] Glicksman, *supra* note 2.
[39] U.S. Environmental Protection Agency, Section 319 Federal Consistency Guidance: Federal Consistency with State Nonpoint Source Management Programs, Office of Water, Washington DC. At: http://www.epa.gov/owow/nps/Section319/319guide.html.
[40] See for example, Memorandum of Understanding Between the State of New Mexico and the U.S. Department of Interior Bureau of Land Management New Mexico State Office, MOU No. NM-355 (1992).

B. Grazing and Other Federal Permit Programs

Grazing is responsible for a large share of nonpoint source pollution in the west.[41] The BLM authorizes grazing and many other activities on public lands through permit systems. Two sections of the CWA apply directly to Federal permit programs and have been used with varying degrees of success to control nonpoint source pollution on Federal lands.

i. CWA § 401: State Certification

Section 401(a) requires any applicant for a federal license or permit which may result in any discharge into waters of the United States to provide to the licensing agency a certification from the state in which the discharge originates that the discharge will comply with applicable provisions of the CWA including WQS and any other appropriate state law.[42] This provision applies to federal licenses and permits, and has been used to control pollution from hydroelectric projects, mining projects, and wetland dredging.[43] However, in 1998 in the case of *Oregon Natural Desert Association (ONDA)* v. *Dombeck*,[44] the Ninth Circuit limited the application of § 401 strictly to point sources.

In *ONDA* v. *Dombeck*, the Ninth Circuit ruled that issuing livestock grazing permits does not trigger the § 401 certification requirements of the CWA. The ONDA alleged that the Forest Service had violated § 401 by issuing a grazing permit without first obtaining certification from the State of Oregon that the grazing would not violate the state's water quality standards.

---

[41] In 1989, the western states themselves identified grazing (a subcategory of agriculture) as the nonpoint source pollution category having the greatest impacts on the quality and beneficial uses of their water. See Preliminary Summary of Findings: Western States Water Council's Nonpoint Source Pollution Survey I-B-2, in Nonpoint Source Pollution Control Workshop – Technical Issues. July 25-28, 1989.
[42] 33 U.S.C. § 13341(a)(1).
[43] Ruggiero, Jory. Toward a Law of the Land: The Clean Water Act as a Federal Mandate for the Implementation of an Ecosystem Approach to Land Management. 20 Pub. Land & Resources L. Rec. 31. 1999.
[44] 172 F.3d 1092 (9th Cir. 1998), cert. denied, 120 S. Ct. 397, 1999.

Finding that the case turned on interpretation of the term "discharge" in the CWA,[45] the court determined that a "discharge" is limited to releases from point sources. Because the court rejected the suggestion that livestock constituted a point source under the CWA, § 401 does not regulate water pollution from livestock grazing.[46] This ruling signifies that § 401 does not apply to permit programs generating nonpoint source pollution.

ii. CWA § 313: Compliance with State Law

Although the Ninth Circuit held in *ONDA* v. *Dombeck* that § 401 does not apply to nonpoint sources, the court specifically identified a legal provision regarding control of nonpoint source pollution at Federal facilities. The court stated that § 313 "plainly applies to nonpoint sources of pollution on federal land."[47]

CWA § 313 provides that:

> Each department, agency or instrumentality of the … Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants … shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.[48]

Section 313 requires Federal agencies to adhere to state water quality requirements.

---

[45] Section 401 requires that:

> Any applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. … No license or permit shall be granted until the certification required by this section has been obtained or has been waived ….

33 U.S.C. § 1341(a)(1). The court determined that each of the sections referenced in § 401 relates to regulation of point sources.

[46] The Ninth Circuit agreed with the Second Circuit that "the term 'point source' does not include a human being or any other animal." 172 F.3d at 1098 (citing *United States v. Plaza Health Labs, Inc*., 3 F.3d 643 (2nd Cir. 1993) (human beings are not point sources subject to criminal liability under the Clean Water Act)).

[47] 172 F.3d 1092, 1098 (9th Cir. 1998). The court left open the question of whether ONDA might have succeeded under a section 313 claim, which ONDA did not bring.

[48] 33 U.S.C. § 1323(a).

This section is significant because it includes the phrase "discharge or runoff."[49] As the Ninth Circuit emphasized in *ONDA v. Dombeck*, "the word 'discharge' [in the CWA] is used consistently to refer to the release of effluent from a point source … [whereas] the term 'runoff' describes pollution flowing from nonpoint sources."[50] The Ninth Circuit has repeatedly confirmed that Federal land management agencies cannot allow activities causing nonpoint source pollution that do not comply with state water quality standards.[51] The Interior Board of Land Appeals (IBLA) has come to a similar conclusion.[52] In *National Wildlife Federation (NWF)* v. *BLM*, the NWF claimed that the BLM's approval of the use of a spring in conjunction with grazing on an allotment violated § 313 because the action would result in degradation of surface water inconsistent with state law. The IBLA confirmed that § 313 requires the BLM to comply with all state water pollution requirements, including regulation of nonpoint sources.

The situation on Federal land appears to be this. States must adopt WQS, and the BLM must ensure that its own activities meet those standards. Private activities, allowed by permit on Federal land, also must not violate state WQS. BMP implementation does not necessarily fulfill the agency's obligation to assure compliance with WQS. However, it is unclear what kind of evidence is required to satisfy courts that violations of WQS have occurred and are attributable to nonpoint sources complying with BMPs.

---

[49] 33 U.S.C. § 1323(a).
[50] 172 F.3d 1092, 1098 (9th Cir. 1998).
[51] *Northwest Indian Cemetery Protective Association, et al. v. R. Max Peterson, Chief, U.S. Forest Service, et al*, 764 F.2d 581 (9th Cir. 1985); *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179 (9th Cir. 1990) (the Forest Service must comply with all state water quality standards, a duty that included violations from nonpoint sources); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998) (Federal agencies must comply with state water quality standards including a state's antidegradation policy).
[52] *National Wildlife Fed'n v. Bureau of Land Management (NWF v. BLM)*, 151 I.B.L.A. 66 (1999).